

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

THERESA MARIE SIMEONE, Personal
Representative of the E state of Albert Francis
Simeone, Jr., Deceased, and THERESA MARIE
SIMEONE, In Her Own Right, and
MARY ANN LENGYEL, Personal
Representative of the E state of George Lengycl,
Deceased, and MARY ANN LENGYEL,
In Her Own Right

CIVIL ACTION NO. 02CV4852

JURY TRIAL DEMANDED

Plaintiffs,

v.

BOMBARDIER CORPORATION GmbH, et al].

Defendants.

**REPLY BRIEF IN SUPPORT OF DEFENDANT
BRP-ROTAX GMBH & CO. KG's MOTION TO DISMISS
PLAINTIFFS'COM PLAIN T FOR LACK OF JURISDICTION and
DEFENDANTS BOMBARDIER INC.'S AND BOMBARDIER CORPORATION'S
MOTION FOR SUMMARY JUDGMENT**

Robert J. Kelly, Esq.
Of Counsel

Suna Lee, Esq.
On the Brief

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Q. Let's talk a little bit about the governing structure of Rotax? Do you understand my question?

A. Yes.

Q. Okay. Who runs - and when I say "who," I mean title, the person. Who runs Rotax at the top on a day-to-day basis?

B. Geschaetsfuehrer.

[THE INTERPRETER: It's translated either as manager director or as general manager]

Q. And as owner the owner of Rotax, Bombardier, Inc., is involved in the day-to-day operations of Rotax, is it not?

A. No.

Q. So you do not agree that they have some substantial control over how Rotax operates on a day-to-day basis?

A. I do not agree to your - soM,. They have no involvement on the day-to-day business.

[See Transcript of Deposition Testimony of Josef Fcirlinger, dated December 3, 2004, attached to Certification of Robert J. Kelly as Exhibit 1, T28:1-4-14; T33:1,17-T34:1-3]. Pursuant to the corporate structure, the General Manager is chosen by the shareholders. [Exhibit 1, T3 I:L9-121.

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- Rotax has its own management team. Claude Ferland, an executive with Bombardier testified as follows:

Q. Can you describe the upper level management Rotax working down from this vice-president/general manager position?

A. Yes. Harold had a management learn where he had a vice-president of finance responsible for all of the financial reporting and the financial performance of Rotax. He had a VP for human resources, HR VP. He had a VP engineering. So basically he had the full organization, like any typical entity what you would find....

[See Plaintiffs' APP-0032 - T32:1- I - 10].

Mr. Furlinger testified that Rotax makes its own decision regarding negotiating contracts. He testified as follows:

Q. Who would have knowledge whether Rotax has to get approval from Bombardier with regard to contracts that it's about to enter into?

A. In the normal course of business of Rotax, we would not need to inform Bombardier, Inc., unless it has a significant

impact to the shareholders.

[Exhibit 1, T61:L]3-22]. Additionally, Rotax maintained its own liability insurance. [See Ferland Deposition Testimony, T68:L2-14, Plaintiffs' APP-00068]. Finally, Rotax owns its own property in Austria. Mr. Furlinger testified as follows:

Q. Who owns the property that Rotax facilities are on in Austria?

A. Rotax.

Exhibit 1, T65: L I 1- 13].

With regard to the Bombardier Inc. policy manual, Mr. Furlinger testified as follows:

Q. Okay. Does Rotax have the Bombardier policy manual?

A. Yes.

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Q. And are there certain Bombardier policies that because of Austrian law do not apply to Rotax?

A. That's correct.

Q. Can you provide me with any of those policies that don't apply to Rotax?

A. Just as an example I would make the traveling policy. Rotax has its own traveling policies to comply with the Austrian law, system and regulations.

Q. Any other examples that you can think of.?

A. There might be some more. Because we have a different working law as - may be not as accomplished. So we have to respect the working law as - for one thing, assessing the working law as one very critical law, and there would be definitely a different system and policy in place.

[Exhibit 1, T4111 -L21]. Moreover, Rotax considers the policy manual to be more of a reference tool or guideline rather than a directive. Mr. Furlinger testified as follows:

Q. ...
When we're referring to this scope here on 63 1, is it your testimony that the way it's written it does apply to Rotax unless there's some Austrian law that would essentially trump this?

A. I would say that it would be used as a reference document or a guideline for Rotax Austria and Rotax as to follow **their own procedure** according to Austrian law.

[Exhibit 1, T40:1,9-25 1 [emphasis added].

B. Rotax's Limited Shipments of Spare Motorcycle Parts to Pennsylvania

During the period 1997-2002, Rotax made limited shipments of spare motorcycle parts to Pennsylvania which totaled 18,136,36 Euros at the direction of its customer, Harley Davidson located in Wisconsin. [See Affidavit of Josef Furlinger, dated February 14, 2005]. The total value of those shipments represents only 1.81% of Rotax's overall sales to Harley Davidson

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during-the-during-the referenced time pduring-the referenced time pduring-the referenced time period. Id. Rotax conducted corporate offices located in Milwaukee, Wisconsin. Id. With the exception of the transactions corporate offices located in AA,A, all deliveries to Harley Davidson were Ex works Guns kirchen, Austria. Id. It is Rotax's business practice, all deliveries to designate designate all sales Ex works Guns kirchen. The limited sales of designate all sales Ex works Guns kirchen. The limited sales emergent emergent basis at the request of Harley due to Harley's obligation to properly service it emergent basis at the request of States States military. Id. Due to the emergent nature of these requests, Harley required 24 hour States military. Id. Due to the emergent be arranged through UPS expedited, as reflected in the invoices. Id.

The invoices reflect that Harley's purchase order originated The invoices reflect that Harley's purchase order originated in Rotax Rotax had with Pennsylvania in connection with these transactions was as a point Rotax had with Pennsylvania in the aforementioned special circumstances. Id. Rotax's aforementioned special circumstances. Id. Rotax's customer and in Wisconsin. Id.

Invoices Invoices addressed to Rotax from the Society of Automotive Engineers and Avanti Invoices addressed to Rotax Pennsylvania Pennsylvania addresses. Id. However, Pennsylvania addresses. Id. However, the principal place of business of the S located outside of Pennsylvania. Id. The total amount of the invoices located outside of Pennsylvania. Id. The total amount of written materials necessary for Rotax business and which could not be obtained elsewhere. Id.

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LEGAL ARGUMENT

POINT I

**PLAINTIFFS CANNOT RELY UPON THE ALTER EGO THEORY
TO ESTABLISH JURISDICTION OVER ROTAX.**

**A. The Alter Ego Theory Is Used to Impute the Jurisdictional Contacts of the
Subsidiary to the Non-resident Parent Corporation Based Upon the Parent
Corporation's Control of the Subservient Subsidiary.**

In general, piercing the corporate veil is permitted in only exceptional circumstances. *Clemens v. Gerber Scientific Inc.*, No. 87-5949, 1989 U.S. Dist. LEXIS 376, at *4 (E.D. Pa. January 13, 1989) (citing *Reverse Vending Assocs. V. Tomra Systems U.S., Inc.*, 655 F. Supp. 1122, 1128 (E.D. Pa. 1987); *Parker v. Bell Asbestos Mines. Ltd.*, 607 F. Supp. 13 97, 13 99 (E.D. Pa. 1985)). "As a general rule, the proper exercise of a personal jurisdiction over a nonresident corporation may not be based solely upon the contacts with the forum state of another corporate entity with which the defendant may be affiliated." *Freudensprung v. Offshore Technical Services, Inc.*, 379 F.3d 327, 346 (5th Cir. 2004) (citing *Cannon Mfg. Co. v. Cudahy Packing Co.*, 267 U.S. 333 (1925)). There is a "presumption of institutional independence of related corporate entities" which may be rebutted only by "clear evidence" which requires a showing of "something beyond the mere existence of a corporate relationship

The fundamental requirement of control by the parent corporation of the subservient, The fundamental requirement of heart of the equitable doctrine of heart of the equitable doctrine of the alter ego corporation. The rationale is that the parent corporation, by virtue of

However, it is well settled that the existence of a factor, alone, is insufficient to find an alter ego relationship. For instance, a finding of a 100% ownership of the subsidiary by the

parent corporation is not dispositive. *Savin Corp.*, 661 F. Supp. at 469 (citing *Hargrave*, 710 F.2d at 1060; *Quarles v. Fuqua Industries, Inc.*, 504 F.2d 1358, 1364 (10th Cir. 1974); *Croyle v. Texas Eastern Corp.*, 464 F. Supp. 377, 379 (W.D. Pa. 1979)).

Likewise, Likewise, Likewise, Likewise, significant "fo]verlapping directors and officers do not alone establish an alter ego relationship. *Arch, Arch*, 984 F. Supp. at 838 (citing *Poe v. Babcock Intl, plc*, 662 F. Supp. 4, 6 (M.D. Pa. 1985) (refusing to apply the alter ego theory of jurisdiction where there are several overlapping directors stating that 'where alter ego theory constitutes one hundred percent of the stock holders of the subsidiary, it is constitutes one hundred percent of the stock holders which are common to the boards of both. '); see also *Clark v. Matsushita Elec. Indus. Co., Matsushita Elec. Indus. Co.*, 1068 F. Supp. 1068 (M.D. Pa. 1993) ("Common officers and directors . . . are not necessarily the alter ego of the subsidiary. . . . In *Savin Corp.*, four of twelve directors of a subsidiary four of twelve directors of its parent corporation, and four of the twelve directors of the subsidiary were also directors of its parent corporation, and the subsidiary's operations of the subsidiary, and the parent company had input regarding the operations of the subsidiary. . . . Yet, the Court in *Savin Corp.* concluded that there was insufficient evidence to 'convince' that [the parent] exercised the type of control over [the subsidiary's] day-to-day operations that would establish an alter ego relationship." Id.

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-- Finally, reporting the subsidiary's financial information within the parent corporations' annual financial statements does not equate with an alter ego relationship. In *Clark*, the Court held that a subsidiary's financial information for [the parent] and its subsidiaries is not the same as the parent's financial information for [the parent] and its subsidiaries in *Clark*, 811 F. Supp. at 1069.

Indeed, courts have recognized that "a corporate parent may properly exercise control over its subsidiary in the ordinary course of business without calling into question the subsidiary's status as a separate legal entity." *Central States v. Reimer Express World Corp.*, 230 F.2d 934, 945 (7th Cir. 1955). In *Central States v. Reimer Express World Corp.*, 230 F.2d 934, 945 (7th Cir. 1955); *Calvert v. Huckins*, 875 F. Supp. 674, 678-79 (E.D. Cal. 1995). In *Central States*, the Court explained that "[p]arents do not expect that performing the subsidiary's business, the subsidiary's actions of the subsidiaries." *Central States*, 230 F.2d at 945. The Court stated that "detailed rules concerning every facet of the subsidiary's business, the subsidiary's actions of the parent. See *Arch*, 984 F. Supp. at 838.

B. Bombardier Inc. Did Not Exert Undue Domination and Control Over Rotax.

In the present case, Plaintiffs cannot prove that Rotax was the alter ego of Bombardier. In this jurisdiction is clear that Plaintiffs' allegations of Bombardier's ownership of Rotax; or Rotax's submission of financial statements between the two entities; or Rotax's status as the alter ego of Bombardier. As courts have recognized, such commonalities are to the alter ego of Bombardier. As courts have recognized, Bombardier's ownership of Rotax. What is dispositive in the case of Bombardier's ownership of Rotax. What is dispositive in the case of Bombardier's ownership of Rotax. However, Josef Hirlinger, an executive who has been employed by Rotax for fifteen years and is currently its director for new business - 12-

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development confirmed unequivocally that Bombardier is not involved in the day-to-day operations of Rotax. [Exhibit I T28:L4-14; T3311 7-T3) 4:L3] .

Moreover, Mr. Furlinger testified that Rotax makes its own decision regarding negotiations and maintains its own liability insurance; and owns its own property in Austria. [Exhibit 1, T61:L) 3-22; T65:L1)-13; T65:L1)-13; and Plaintiffs' AAPAPP-00068 -T68:L2-14]. Claude Ferland, an executive of Bombardier, testified that Bombardier, testified that Rotax had its own management team consisting of Bombardier, tes

claims against BC. [See claims against BC. [See Plaintiffs' Brief, p. 34, fh. 8]. However, as demonstrated claims against BC. [S that that Rotax that Rotax is the alter ego of Bombardier. that Rotax is the alter ego of Bombardier. Accordingly, Plaintiffs cannot ro product liability against Bombardier.

POINT III

PLAINTIFFS CANNOT ESTABLISH JURISDICTION AGAINST ROTAX VIA THE LIMITED SHIPMENTS OF SPARE MOTORCYCLE PARTS TO PENNSYLVANIA AS SUCH CONDUCT DOES NOT RISE TO THE LEVEL OF MINIMUM CONTACTS.

A. Sporadic, Isolated Shipment of Products to the Forum State is Insufficient to Confer Personal Jurisdiction Over a Non-resident Defendant.

In *Asahi Metal Industry Company v. Superior Court Of COI~f0l-nia, Solano County*, U.S. 102 (1987), the Supreme Court presented three separate tests to finding jurisdiction with respect to actions against producers and sellers of goods via the stream of commerce theory. The Third Circuit applies all three tests to ascertain whether a non-resident defendant's contacts with the forum state was sufficiently continuous and systematic to justify the exercise of jurisdiction. *Visual Security Concepts, Inc. v. KTV, Inc.*, 102 F. Supp. 2d 601, 606-07 (E.D. Pa. 2000), *affd without opinion*, 2001 U.S. App. LEXIS 23555 (2001) Justice O'Connor's test required that the placement of a product into the stream of commerce must be accompanied by some "additional conduct of the defendant that may indicate an intent or purpose to serve the market in the forum State." *Asahi*, 480 U.S. at 112. Justice Brennan's standard for personal jurisdiction requires a "regular and anticipated flow of the defendant's products" into the forum and that the defendant

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"is" is aware that "is aware that the final product is being" is aware that the final product is being marketed in the forum State, that cannot come as a surprise." Id. at 117. Justice Stevens' test requires cannot come as a surprise." Id. at 117. Justice Stevens' t into the stream of commerce of sufficient "amount, value, and hazardous character." *Asahi*, 480 U.S. at 122.

Consistent with the *Asahi* tests, the tests, the District Courts of this jurisdiction have recognized that tests, the Dis defendant's defendant's limited sales of a defendant's limited sales of a prod defendant's limited sales of a product into the forum sufficient to rise to the level sufficient to rise to the level of minimum contacts to justify sufficient to rise to the level of minimum contacts. *Co. Co. v. BBI Produce, Inc.*, 123 F. Supp. 2d 268, 272 (M.D. Pa. 2000); *Orange Products, Orange Prods*, 118461 (E.D. Pa. 1995) (no jurisdiction despite 2.7% of its precision plastic balls in Pennsylvania); *Romann v.*

Geissen er Mfg. Corp., 865 F. Supp. 255 (E.D. Pa. 1994) (no jurisdiction despite 24% of its 9

auto-related auto-related sales within Pennsylvania); *Modern Mailers, Inc. Modern Mailers, Inc. v. Johnson & Quin, Inc.*, 844 F.84 (E.D. Pa. 1994) (no jurisdiction despite .5% direct sale to Penn (no jurisdiction despite .5% direct sale to Pennsylvania (no *Corp.*, 785 F. Supp. 494 (M.D. Pa. 1992) (no jurisdiction despite 1 % of sales of footwear in Pennsylvania).

In *Rosenstein*, Plaintiff Plaintiff alleged that the Court should exercise Plaintiff alleged that the Court should exercise jurisdiction on the ground that the defendant sold its products in the forum state. on the ground that the defendant sold its products in the forum state. on the the Court declined to exercise jurisdiction finding that the sales were so limited that Defendant could the Court declined to exercise jurisdiction on notice that it would be subject to suit in on notice that it would be subject to suit in that state. Pennsylvania strawberry sales do provide the minimum Pennsylvania strawberry sales do provide the minimum contacts required .05%.05% of its produce to Pennsylvania purchasers. This small amount of busi.05% of its produce to Pennsylvania purchase notice that it might be haled into court in Pennsylvania." Id.

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BasedBased upon the reasons setBased upon the reasons set forth above, BRP Rotax GmbH & Co. KG respectfully request

FirstFirst Amended ComplaintFirst Amended Complaint be dFirst Amended Complaint be dismissed, as this Court does not ha
GmbHGmbH &GmbH & Co. KG. Defendant Bombardier Inc. also respectfully requestsGmbH & Co. KG. Defendant Bombardier
bebe dismissed, as it did not design, manufacture, sell, or otherw ise distributebe dismissed, as it did not design, manufacture, sell,
subject of this litigation.

Respectfully submitted,

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Date: February 14, 2005

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**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

THERESA MARIE SIMEONE, et al].
Plaintiffs,

v.

BOMBARDIER-ROTAX GmbH & Co. KG, et al].,
Defendants.

CIVIL ACTION NO. 02CV4852
**CERTIFICATION OF ROBERT J.
KELLY, ESQ. IN SUPPORT OF
DEFENDANTS' MOTION TO
DISMISS PLAINTIFFS'
COMPLAINT AND MOTION FOR
SUMMARY JUDGMENT**

1, ROBERT J. KELLY, Esq., of full age certifies as follows:

I . I am an attorney at law of the State of New Jersey and am a partner of the firm of
Wilson, Elser, Moskowitz, Edelman & Dicker LLP, attorneys for Defendants, BRP-Rotax GmbH
& Co. KG f/k/a Bombardier-Rotax GmbH & Co. KG, Bombardier, Inc. and Bombardier
Corporation in the above-entitled matter.

2. I am in active charge of handling this file and in such capacity, am fully familiar
with the facts stated herein.

3. Annexed hereto as Exhibit I is a true and accurate copy of the Transcript of the Deposition Testimony of Josef Fiirlinger, dated December 3, 2004.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements are willfully false, I am subject to punishment.

Dated: February 14, 2005

Robert J. Kelly, Esq.